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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

JOSEPH FLORIO, )  
Plaintiff, )  
vs. )  
SIERRA PACIFIC MORTGAGE CO., INC. et al., )  
Defendants. )

3:10-cv-00524-RCJ-RAM

ORDER

This is a standard foreclosure case involving one property. The Complaint is a forty-five-page MERS-conspiracy-type complaint listing eleven causes of action, although the eleventh cause of action is erroneously numbered as the "fourteenth": (1) Injunctive Relief, (2) Declaratory Relief; (3) Debt Collection Violations Under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, as incorporated by Nevada Revised Statutes ("NRS") Section 649.370; (4) Violation of Unfair and Deceptive Trade Practice Act Under NRS Section 598.9023; (5) Unfair Lending Practices Under NRS Section 589D.100; (6) Violation of the Covenant of Good Faith and Fair Dealing; (7) Rescission of the Trustee's Deed Under NRS section 107.080 *et seq.*; (8) Quiet Title; (9)–(10) Fraud; and (11) Unjust Enrichment.

Three motions are pending before the Court: two motions to dismiss and one motion to remand. The case is not a part of MDL Case No. 2119; however, MERS has filed a Notice of

1 Tag-Along Actions with the Judicial Panel on Multidistrict Litigation (“JPML”) that includes the  
 2 present case. (*See* Notice, Sept. 10, 2010, ECF No. 16).

3 **I. THE PROPERTY**

4 Joseph and Sandra Florio gave a \$316,000 mortgage to Sierra Pacific Mortgage Co., Inc.  
 5 to purchase their home at 4090 Royal Sage Dr., Reno, NV 89503 (the “Property”). (*See* First  
 6 Deed of Trust (“FDOT”) 1–3, Aug. 9, 2006, ECF No. 11, at 14). The trustee was Greenhead  
 7 Investments, Inc. (“Greenhead”). (*See id.*). The Florios executed a second deed of trust for  
 8 \$79,000 on the same date, with the same lender and trustee. (*See* Second Deed of Trust  
 9 (“SDOT”), Aug. 9, 2006, ECF No. 11, at 30). As of August 1, 2009, they had defaulted in an  
 10 unspecified amount. (*See* Notice of Default (“NOD”), Nov. 3, 2009, ECF No. 11, at 40).  
 11 Recontrust Co., N.A., as agent for First American Title, filed the NOD. (*See id.*). There is no  
 12 indication of any substitution of trustee in the record. The Property was sold on June 1, 2010.  
 13 (*See* Trustee’s Deed, June 10, 2010, ECF No. 11, at 44). Recontrust had obtained a certificate  
 14 from the state Foreclosure Mediation Program that no request for mediation was made or that  
 15 mediation was waived. (*See* Certificate, Mar. 22, 2010, ECF No. 11, at 48). Plaintiff filed the  
 16 Complaint on June 21, 2010. (*See* Compl. 1, June 21, 2010, ECF No. 1-1).

17 **II. ANALYSIS**

18 The Court denies the motion to remand, as there is both federal-question and diversity  
 19 jurisdiction. Section 649.370 creates no private cause of action,<sup>1</sup> so the claim that refers to  
 20 FDCPA necessarily relies directly on the federal cause of action. Even if the Court found an  
 21 implied state cause of action, it would necessarily require substantial interpretation of federal  
 22 law, because a violation of the state statute is defined purely by reference to FDCPA. *See Mesi v.*  
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24           <sup>1</sup>Neither “damages,” “cause of action,” nor “attorney’s fees” appear anywhere in Chapter  
 25 649. The Chapter provides only for criminal penalties or administrative fines. *See* Nev. Rev.  
 Stat. §§ 649.435, 649.440.

1     *Wash. Mut. F.A.*, No. 3:09-CV-582 JCM (VPC), 2010 WL 3025209, at \*2 (D. Nev. July 30,  
2 2010) (Mahan, J.). *Contra Atkinson v. Homecomings Fin., LLC*, No. 3:10-cv-00418-LRH-VPC,  
3 2010 WL 3271741, at \*2 (D. Nev. Aug. 16, 2010) (Hicks, J.) (“[C]ontrary to Defendants’  
4 position, the act defines a state claim that is separate from its federal counterpart. Although a  
5 federal regulation is expressly noted in the Nevada statute, the reference to the federal act only  
6 provides a framework for determining the type of claim that can be brought under the state  
7 statute.”). The Court respectfully believes that the *Mesi* case is better reasoned. Although an  
8 appropriately drafted state statute could incorporate federal standards in such a way that a  
9 violation of federal standards would be sufficient, but not necessary, to constitute a violation of  
10 the state statute, in the present case the Nevada Legislature has made the reach of section  
11 649.370 coextensive with FDCPA and its attendant regulations. *See Nev. Rev. Stat. § 649.370*  
12 (“A violation of any provision of the federal Fair Debt Collection Practices Act, 15 U.S.C. §§  
13 1682 *et seq.*, or any regulation adopted pursuant thereto, shall be deemed to be a violation of this  
14 chapter.”). The *Atkinson* court reasoned that because the Nevada Supreme Court had resolved  
15 other sections of Chapter 649 without reference to federal law, a section 649.370 claim could be  
16 resolved without the substantial interpretation of federal law. *See Atkinson*, 2010 WL 3271741,  
17 at \*2 (citing *State v. Hartford Accident & Indem. Co.*, 477 P.2d 592 (Nev. 1970)). But *Hartford*  
18 did not involve the resolution of any section of Chapter 649 that made reference to federal law,  
19 much less section 649.370, which was enacted thirty-seven years after *Hartford* was decided. *See*  
20 2007 Nev. Stat. 2500; *Hartford*, 477 P.2d at 593 (interpreting former section 649.080, which did  
21 not rely on any federal law). The fact that some sections of Chapter 649 can be applied without  
22 interpreting federal law tells us nothing about whether any other particular section therein can  
23 be. Plaintiff has not pled any violation of Chapter 649 except section 649.370, which is by its  
24 text coextensive with FDCPA. Therefore, any claim under section 649.370 necessarily requires  
25 the substantial interpretation of federal law, and there would be federal-question jurisdiction

1 even if a private cause of action lied under Chapter 649 such that Plaintiff did not need to rely on  
 2 FDCPA directly.

3 Federal-question jurisdiction can be based purely on a state claim if its resolution  
 4 necessarily requires the construction of federal law:

5 The rule is well settled that a state claim “arises under” federal law “if the  
 6 complaint, properly pleaded, presents a substantial dispute over the effect of federal  
 7 law, and the result turns on the federal question.” *Guinasso v. Pacific First Fed. Sav.*  
*& Loan Ass’n*, 656 F.2d 1364, 1365–66 (9th Cir. 1981), *cert. denied*, 455 U.S. 1020,  
 102 S. Ct. 1716, 72 L. Ed. 2d 138 (1982). The “vast majority of cases brought under  
 8 the general federal-question jurisdiction of the federal courts are those in which  
 9 federal law creates the cause of action[.]” *Merrell Dow Pharmaceuticals Inc. v.*  
*Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L. Ed. 2d 650 (1986), but  
 a case may also arise under federal law ““where the vindication of a right under state  
 10 law necessarily turn[s] on some construction of federal law.”” *Id.* (quoting *Franchise*  
*Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9, 103 S. Ct. 2841,  
 2846, 77 L. Ed. 2d 420 (1983)).

11 *Berg v. Leason*, 32 F.3d 422, 423 (9th Cir. 1994). In cases such as the present one, where the  
 12 state claim directly incorporates the substance of federal law, *see Nev. Rev Stat. § 649.370*, and  
 13 where the state claim raises no federal constitutional issues, federal-question jurisdiction exists  
 14 only if the federal law that is incorporated into the state claim provides an independent federal  
 15 claim:

16 In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S. Ct.  
 17 3229, 92 L. Ed. 2d 650 (1986), the Court considered in detail the principles of  
 18 removal jurisdiction when applied to a well-pleaded complaint that relies on a state  
 cause of action which incorporates federal law as one of the elements of recovery.  
 The Court held that in such a case, the state claim does not involve a substantial  
 19 federal question unless the federal law incorporated in the state cause of action  
 provides a federal private right of action for its violation. *Id.* 106 S. Ct. at 3237; *see also Utley v. Varian Assoc., Inc.*, 811 F.2d 1279 (9th Cir.) (applying *Merrell Dow*),  
*cert. denied*, 484 U.S. 824, 108 S. Ct. 89, 98 L. Ed. 2d 50 (1987).

21 *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1394 n.4 (9th Cir. 1988). The FDCPA provides  
 22 a private right of action. *See* 15 U.S.C. § 1692k. If NRS section 649.370 contained additional  
 23 substantive bases for liability apart from FDCPA, then such bases of liability could be invoked  
 24 without creating federal-question jurisdiction. But section 649.370 refers exclusively and  
 25

1 coextensively to FDCPA for its substance and provides no basis for liability apart from that  
2 provided for in FDCPA, under which a private, federal right of action lies. The Court therefore  
3 finds that even if a private cause of action lied under section 649.370 (none does), such a claim  
4 would support federal-question jurisdiction. *See Ethridge*, 861 F.2d at 1394 n.4.

5 Furthermore, there appears to be complete diversity. The only non-diverse Defendant is  
6 Ticor Title of Nevada, which is fraudulently joined because it is not alleged to have had any  
7 hand in the origination or servicing of the loan, but was only an escrow agent. It is not even  
8 alleged to have had any hand in the foreclosure process. In other words, Ticor Title is no more  
9 liable for any tort concerning the loan than is the postal carrier who delivered the signed copies  
10 of the loan documents to Plaintiff's house.

11 Next, contrary to Plaintiff's arguments, "doe" and "roe" defendants are ignored for the  
12 purposes of diversity. 28 U.S.C. § 1441(a) ("For purposes of removal under this chapter, the  
13 citizenship of defendants sued under fictitious names shall be disregarded."); *Cripps v. Life Ins.  
Co. of Am.*, 980 F.2d 1261, 1266 (9th Cir. 1992) (citing *id.*); *Bryant v. Ford Motor Co. (Bryant  
II)*, 886 F.2d 1526, 1528 (9th Cir. 1989) (citing *id.*) ("Congress obviously reached the conclusion  
16 that doe defendants should not defeat diversity jurisdiction."), *cert. denied*, 493 U.S. 1076  
17 (1990). The 1988 amendment to § 1441(a) that established the current rule overruled the Ninth  
18 Circuit's 1987 ruling in *Bryant I. Cripps*, 980 F.2d at 1266 & n.5 (citing *Bryant v. Ford Motor  
Co. (Bryant I)*, 832 F.2d 1080, 1082–83 (9th Cir. 1987) (en banc)). Counsel for Plaintiff fails to  
20 point out this binding, adverse authority, as is his ethical duty to the Court, instead relying on a  
21 1986 district court opinion for the contrary proposition.

22 Finally, the subject matter of the lawsuit is the \$316,000 loan and the Property securing  
23 it. The loan is in default and has been accelerated, and Plaintiff seeks to invalidate the  
24 completed transfer of the Property and also to prevent any future foreclosure. If Plaintiff were to  
25 win all his claims as pled, Defendants would lose more than \$75,000 in missed payments and be

1 left with no security interest in the property. The amount-in-controversy requirement is satisfied.

2 As in most similar cases, the only plausible claim is for statutorily defective foreclosure  
3 under NRS section 107.080(2)(c). In the present case, the issue is relatively simple: Recontrust  
4 foreclosed, and there is no evidence it was ever substituted as trustee or otherwise had authority  
5 from the beneficiary to foreclose.

6 **CONCLUSION**

7 IT IS HEREBY ORDERED that the Motion to Remand (ECF No. 4) is DENIED.

8 IT IS FURTHER ORDERED that the Motions to Dismiss (ECF Nos. 10, 22) are  
9 GRANTED in part and DENIED in part. All claims are dismissed except the claim for  
10 injunctive relief due to statutorily defective foreclosure.

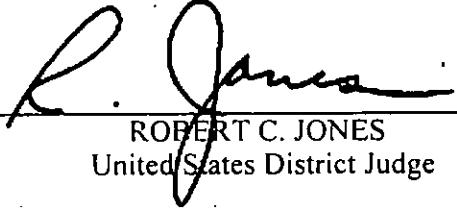
11 IT IS FURTHER ORDERED that Defendants will not transfer or lease the Property or  
12 take any action to evict Plaintiff from the Property for one-hundred (100) days. During this  
13 period, Plaintiff will make full, regular monthly payments under the note every thirty (30) days,  
14 with the first payment due ten (10) days after the date of this order. The amount of each  
15 payment will be according to the monthly payment as of the date of the NOD. Failure to make  
16 monthly payments during the injunction period will result in a lifting of the injunction. Plaintiff  
17 need not pay late fees or cure the entire amount of past default at this time but may be required in  
18 equity to cure the entire past default as a condition of any future permanent injunction voiding  
19 the trustee's sale.

20 IT IS FURTHER ORDERED that during the injunction period the parties will engage in  
21 the state Foreclosure Mediation Program, if available. If not available, Defendants will conduct  
22 a private mediation with Plaintiff in good faith. The beneficiary must send a representative to  
23 the mediation with actual authority to modify the note, although actual modification is not  
24 required. Plaintiff will provide requested information to Defendants in advance of the mediation  
25 in good faith.

1 IT IS FURTHER ORDERED that Defendants remain free during the injunction period to  
2 submit motions for summary judgment to show a proper chain of assignments of the note and/or  
3 substitutions of trustee, in which case summary judgment on the remaining claim will be  
4 appropriate.

5 IT IS SO ORDERED.  
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7 Dated this 19<sup>th</sup> day of January, 2011.

8   
9 ROBERT C. JONES  
10 United States District Judge  
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